Privy Council Appeal No. 49 of 1984

The Board of Inland Revenue *Appellant*

v.

Winston Herbert Edward Suite *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH APRIL 1986

Present at the Hearing:

LORD TEMPLEMAN
LORD WILBERFORCE
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR JOHN STEPHENSON

*[Delivered by **Lord Templeman**]*

The respondent, Mr. Suite, was at all material times a teacher employed by the Government of Trinidad and Tobago. By the Constitution of Trinidad and Tobago as amended by the Trinidad and Tobago Constitution (Amendment) Act 1968, the Teaching Service Commission exercises over teachers the disciplinary and other powers conferred by the Public Service Commission Regulations 1966 over officers of the public service.

By Regulation 89:-

"(1) Where there have been or are about to be instituted against an officer -

(a) disciplinary proceedings for his dismissal; or

(b) criminal proceedings,

and where the Commission is of opinion that the public interest require that that officer should forthwith cease to perform the functions of his office, the Commission shall interdict him from such performance.

(2) -

(3) An officer so interdicted shall ... be permitted to receive such proportion of the pay of his office, not being less than one-half, as the Commission may determine, after taking into consideration the amounts being deducted per month from the pay of the officer.

(4) If disciplinary proceedings against any such officer result in his exoneration, he shall be entitled to the full amount of the remuneration which he would have received if he had not been interdicted, but if the proceedings result in any punishment other than dismissal, the officer shall be allowed such pay as the Commission may in the circumstances determine."

Regulation 112 directs that:-

"An officer acquitted of a criminal charge in any court shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted ..."

Regulation 113 provides that:-

"If an officer is convicted in any court of a criminal charge ... the Commission may thereupon dismiss or otherwise punish the officer without the institution of any disciplinary proceedings under these regulations."

The necessary implication from these Regulations is that an officer charged with a criminal offence who is suspended from his office and put on half pay by the Commission will be entitled, if he is acquitted, to receive upon his acquittal the half pay which has been withheld from him during the period of suspension. An officer acquitted by the court cannot be in any worse position than an officer exonerated as a result of disciplinary proceedings and entitled to the restoration of his full salary pursuant to Regulation 89(4).

On 8th April 1970 the respondent was charged with offences of malicious damage and riotous behaviour. By letter dated 11th May 1970 the respondent was informed by the Teaching Service Commission that he was interdicted from duty on half salary on the grounds that he had been charged with malicious damage and riotous behaviour. The respondent was acquitted of these charges in 1971 but remained under interdiction and in receipt of only half his salary because other criminal charges had been preferred against him. On 7th April 1976 the Attorney-General informed the respondent that all criminal proceedings then pending against the respondent had been discontinued. Thereupon the respondent became

entitled to receive the half salary which had been withheld from him since his interdiction in May 1970. By a letter dated 24th May 1976 the Commission informed the respondent that the Commission had decided (sic) that he should be re-instated in the teaching service and that "the half salary withheld from you during your interdiction should be restored to you". Subsequently, in 1976 the respondent was paid $35,803.92 representing the total amount of half salary which had been withheld from him during the years 1970 to 1975.

The appellant Board of Inland Revenue assessed the respondent to income tax on the footing that the sum of $35,803.92 formed part of his income for 1976. The respondent contends that he should only have been assessed after his acquittal for each of the years 1970 to 1975 in respect of the half salary withheld from him in that year and that he cannot be assessed for any part of the sum of $35,803.92 for the year 1976. The Tax Appeal Board and the Court of Appeal of Trinidad and Tobago, by a majority, found in favour of the respondent. The Inland Revenue appealed with leave to the Judicial Committee. The respondent did not appear on the hearing of the appeal but Mr. Newman Q.C. who represented the Inland Revenue very properly and helpfully referred to all the relevant authorities.

The Income Tax Ordinance (Ch. 33 No. 1) of Trinidad and Tobago ("the Ordinance") is clearly and historically derived from the fiscal legislation of the United Kingdom, albeit with particular and material differences and distinctions.

By section 5 of the Ordinance:-

"(1) Income tax shall ... be payable ... for each year of income upon the income of any person ... in respect of -

(a) gains or profits from farming, agriculture, forestry, fishing or other primary activity;

(b) gains or profits from the operation of mines ... or mineral resources;

(c) gains or profits from any other trade or business;

(d) gains or profits from the practice of any profession or vocation ...

(e) gains or profits from any employment or office including pensions or emoluments ...

(f) short term capital gains;

(g) interest, discounts, annuities or other annual or periodical sums;

(h) rents for real property and [mineral royalties] ...;

(i) rentals and royalties for the use or the right to use [copyrights etc.];

(j) premiums, commissions, fees and licence charges;

(k) dividends, or other distributions;

(l) -

(m) any annual gains or profits not falling under any of the foregoing paragraphs."

By section 6:-

"6. Tax shall be charged for each year of income upon the chargeable income of any person for that year."

By section 2 the expression:-

"'Chargeable income' means the aggregate amount of the income of any person from the sources specified in section 5 ..."

The expression:-

"'Year of income' means the period of twelve months commencing on the 1st January, in each year."

Income tax can only be charged for each year of income if three conditions are satisfied. First, the taxpayer must be liable to pay tax for the year in question. There is no doubt that the respondent was liable to pay tax for the year 1976. Secondly, the taxpayer must have received the income sought to be charged. There is no doubt that in the year 1976 the taxpayer received income of $35,803.92 being gains or profits from his employment as a teacher therefore chargeable under section 5(1)(e). Thirdly, the income must be the income of the taxpayer for the year in question. It is this third condition which has given rise to controversy. The sum of $35,803.92 was, say the Inland Revenue, the income of the respondent for 1976 because he received payment in that year. The respondent contended below that the sum of $35,803.92 represents the half salary of the respondent for each of the years 1970 to 1975. As such, it is a gain or profit from his employment as a teacher in respect of services rendered by him during each relevant year. Gains or profits from employment "for each year of income" (section 6) means, in the submission of the respondent, emoluments "in respect of services rendered during the year". The respondent having received during 1976 emoluments for each of the years 1970 to 1975 became liable to be assessed to income tax on the appropriate emoluments in respect of each of the years 1970 to 1975 but not in respect of the year 1976.

In *St. Lucia Usines and Estates Co. Ltd. v. Colonial Treasurer of St. Lucia* [1924] A.C. 508 income tax in St. Lucia was charged on income "arising or accruing" to any person who was resident in the colony or had income derived from a source in the colony. Income tax for the tax year ending 31st December 1921 was leviable on profits for the year ended 30th September 1920 provided that the taxpayer was resident in the colony during the year 1921 or had income in that year derived from a source in the colony. The appellant company carried on business in the colony in 1920 but was not resident in the colony in 1921 and did not receive in 1921 any income derived from a source in the colony. Interest derived from a source in the colony, namely interest on the unpaid purchase price of land in the colony, was due to be paid in 1921 but was not in fact paid until 1922. This Board held that income which was payable but not paid in 1921 was not interest "arising or accruing" in 1921. Lord Wrenbury, giving the advice of the Board, said at page 512 "There must be a coming in to satisfy the word 'income'". The company had no income in 1921 and therefore could not be taxed. The *St. Lucia* case deals with taxability not assessability. In the present case the respondent has at all material times been liable to pay income tax. Income was received by him in 1976 but the question is for what years of assessment is that income chargeable.

In *Leigh v. IRC* [1928] 1 K.B. 73 where a taxpayer purchased foreign bonds in 1918 and received in 1921 arrears of interest from 1914 to 1919, the arrears of interest received in 1921 were held to form part of the total income of the taxpayer for surtax purposes for the year 1922. Section 5 of the Income Tax Act 1918 provided that:-

> "(1) For the purposes of super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year ...
>
> (2) Where an assessment to income tax has become final and conclusive for the purposes of income tax for any year, the assessment shall also be final and conclusive in estimating total income from all sources for the purposes of super-tax for the following year ...
>
> (3)(c) any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable ... notwithstanding that the income ... accrued in whole or in part before that year."

Rowlatt J. said at page 77:-

> "The taxable income for super tax is the total income for the previous year, and one has to find out what that is. If it has been directly assessed to income tax that settles the matter, but if it has not, it remains to be dealt with ... section 5 of the Income Tax Act, 1918 ... was designed to eliminate any question of accrual or gradual growth of the income. In certain cases for income tax purposes when tax is deducted before receipt, it is deducted according to the rate in force when the money accrued, which in some cases means an average rate. But for super tax purposes there is to be one rate only. It was intended in the case of super tax to avoid any variation in the rate. In doing so the statute has used the word 'receivable' and that is what (the taxpayer) has fastened upon. It is to be remembered that for income tax purposes 'receivability' without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it. The meaning of the section must be 'receivability' speaking of a debt which has been received, and means the date on which it is paid as distinct from the date on which it was accruing."

That case which was dealing with the effect of section 5 of the Income Tax Act 1918 on a debt of arrears of interest does not assist in determining the relevant year of assessment of gains or profits from employment chargeable under section 5(1)(e) of the Ordinance.

In *Lambe v. CIR* [1934] 1 K.B. 178 interest on a mortgage by a company was not paid after 29th September 1929, the company went into receivership and it was doubtful whether the unpaid interest payable in the year ending 5th April 1931 would ever be paid. The Revenue sought to include the arrears in the taxpayer mortgagee's total income from all sources for surtax purposes for the year ending 5th April 1931. Finlay J. at page 182 considered:-

> "... whether, where there is a sum due to the taxpayer by way of interest, which by reason of the default of the debtor is not paid, that sum can come in as a part of the income. Looking at the matter quite generally, one would suppose that income means that which comes in, and that it refers to what is actually received."

Finlay J. then, at page 183, considered the question of assessability as opposed to taxability. He said:-

> "What is the position where there is income receivable in a number of years, one, two, three, four and five and nothing is received in one,

> two, three or four but in five the whole of the five years' income is paid? It is a difficult question and one upon which, it seems to me, looking at the authorities, opinion to some extent may well have fluctuated, whether, when that payment is made, it is to be treated as income of year five in which it is made, or as income of the years one, two, three and four in respect of which, as well as of year five, it is paid ... the judges deciding these difficult cases were none of them suggesting that there can be a tax where there is in fact no income received. But as I have said there is room for a difference of opinion as to the year for which the income received is assessable."

The question of the relevant year of assessment discussed by Finlay J. in *Lambe v. CIR (supra)* at page 183, in connection with liability under Schedule D of the English Income Tax Act for interest, was discussed in *Dracup v. Radcliffe* (1946) 27 T.C. 188 in connection with liability under Schedule E for gains or profits from employment. That Schedule provided for taxation in respect of salaries etc. "for the year of assessment".

In *Dracup v. Radcliffe* a director of a company was appointed on 18th May 1942. On 28th July 1942 she was voted for her services during the company's year ending 30th June 1942 the sum of £375.00. For the company's year ending 30th June 1943 she was voted the further sum of £375.00 on 27th July 1943. She was assessed to tax for the tax year ending 5th April 1943 on £656.00 consisting of the whole of the first payment of £375.00, which she had received during the year of assessment in respect of her services from 18th May 1942 to 30th June 1942, and £281.00 or three-quarters of the second sum of £375.00 which she only received after the end of the year of assessment but received in respect of her employment from 1st July 1942 to 5th April 1943. The taxpayer contended that she should only be taxed on the footing that she received £375.00 in the tax year 1942/43 and £375.00 in the tax year 1943/44. She was not entitled to anything until her remuneration was voted and paid over. The Revenue contended that the assessment for each year should be based on emoluments earned during that year and not on emoluments received during that year. Macnaghten J. upheld the Revenue. It is inconceivable that Mr. Graham-Dixon, who appeared as counsel for the taxpayer, Mr. Reginald P. Hills (as he then was) who appeared for the Revenue and Macnaghten J. were all unaware of, or overlooked, the decision of Finlay J. in *Lamb v. CIR (supra)* or the authorities mentioned by Finlay J. dealing with arrears of interest and any other payments chargeable under Schedule D of the English Income Tax Act.

In *Heasman v. Jordan* [1954] Ch. 744 an employee received in 1945 a bonus of £1,250.00 awarded by the directors of the employer company in that year but expressed "to mark their appreciation of the loyalty and industry of the monthly staff during the war years ...". The Revenue claimed that the bonus was an emolument assessable to income tax for the year 1945 when it was received. The taxpayer successfully claimed that the bonus was assessable as income of the years 1941 to 1945. Tax was chargeable under Schedule E Rule 1 which charged every person having an office or employment of profit "in respect of all salaries, fees, wages, perquisites, or profits whatsoever therefrom for the year of assessment". Mr. Heyworth Talbot Q.C. and Mr. Major Allen appeared for the taxpayer. The Solicitor General Sir Lynn Ungoed-Thomas Q.C. and Sir Reginald Hills appeared for the Revenue. Again no reference was made to the decision in *Lambe v. CIR (supra)* or to the authorities dealing with Schedule D profits and gains. This omission cannot have been due to inadvertence but must have been due to the recognition that the Schedule D authorities were irrelevant. Roxburgh J. said at page 749:-

> "The words 'for the year of assessment' in rule 1 of Schedule E mean, in my judgment, 'in respect of the year of assessment'; and, where reward for services is in question, mean 'in respect of services rendered during the year of assessment'. Sir Lynn first submitted that the words 'for the year of assessment' meant 'paid during the year of assessment'; but that is, in my judgment, in conflict with two cases to which I will refer, and would, moreover, have surprising consequences. Supposing that a quarter's salary due on April 1st 1945 was paid on April 10th 1945, and that the four quarterly instalments of salary for the tax year 1945-46 were paid on the due dates, on Sir Lynn's interpretation it would appear that three-quarters of the total salary would be assessed in one year of assessment and five quarters of the total salary in another year of assessment, which would seem to be an impossible conclusion."

In *Heasman v. Jordan (supra)* the taxpayer was not entitled to any bonus until 1945. In the present case the respondent received in 1976 the half salary withheld from him between 1970 and 1975 and to which he was at all times entitled subject only to obtaining the dismissal of the criminal charges brought against him. *Dracup v. Radcliffe (supra)* and *Heasman v. Jordan (supra)* decided that tax on arrears of salary will be assessed not by reference to the year of receipt of those arrears but by reference to the year in which the salary was earned. In respect of gains or profits or emoluments from employment

income "for the year of assessment" means income "in respect of services rendered during the year of assessment". Similarly, in the present case, upon the true construction of the Ordinance gains or profits from employment for each year of income means gains or profits from employment in respect of services rendered during the year of income. As appears from the facts of the present case and from the illustration given by Roxburgh J. in *Heasman v. Jordan (supra)* the result of charging arrears of salary for the year of receipt and not for the year during which the relevant services were rendered would produce an unfair and unacceptable result. Doubt has not been cast on *Dracup v. Radcliffe (supra)* or on *Heasman v. Jordan (supra)* notwithstanding the passage of time since those decisions were delivered and both cases are cited in Simons Taxes without adverse comment.

The Inland Revenue finally and most strongly relied on the decision of the House of Lords in *Whitworth Park Coal Co. Ltd. and Others v. IRC* [1961] A.C. 31. In that case, the Coal Industry Nationalisation Act 1946 provided for payments to be calculated and paid to a former colliery company "with reference to a provisional calculation of the comparable ascertained value". One such payment was paid on 7th August 1948 and expressed to be paid for the eighteen months ended 30th June 1948. It was held by a majority of their Lordships that each payment was an "annual payment" taxable under Case III of Schedule D and assessable as "income arising" in the year of receipt and not as income for the period in respect of which it was expressed to be paid. Viscount Simonds said at page 62:-

> "The case has often arisen of a trader being required to pay tax on something which he has not yet received and may never receive, but we were informed that there is no reported case where a non-trader has had to do this whereas there are at least three cases to the opposite effect - *Lambe v. IRC* (above), *Dewar v. Inland Revenue Commissioners* [1935] 2 K.B. 351 and *Grey v. Tiley* (1932) 16 T.C. 414, and I would also refer to what was said by Lord Wrenbury in *St. Lucia Usines* (above). I certainly think that it would be wrong to hold now for the first time that a non-trader to whom money is owing but who has not yet received it must bring it into his income tax return and pay tax on it. And for this purpose I think that the company must be treated as a non-trader, ... I would not put it that there is any general or universal principle that sums not yet paid must or must not be brought into assessment to income tax. There are two quite different cases. Traders pay tax on the balance of profits and gains and bring money owed to them into

> account in striking that balance, but ordinary individuals are not assessable and do not pay tax until they get the money because until then it is not part of their income. There may well be difficult border-line cases which do not clearly fall into either of these classes and I do not attempt to foresee how that should be decided, but the payments in this case being pure profit income and not being trading receipts must, I think, be put in the second of these classes."

The Schedule E cases of *Dracup v. Radcliffe (supra)* and *Heasman v. Jordan (supra)* were not cited in the *Whitworth Park Coal Company* case and it is impossible to believe that those cases were overlooked. The decision of the House of Lords in *Whitworth Park Coal Company* dealing with Schedule D payments does not affect the principle that gains and profits from an employment for a year of assessment or for a year of income means gains or profits in respect of services rendered during that year.

In the present case the respondent could not be taxed until 1976 because he did not receive his arrears of salary until 1976. But, when received, the arrears of each year from 1970 to 1975 were assessable as part of the income of that year. The arrears of remuneration which the respondent received in 1976 would have been received between 1970 and 1975 if the respondent had not been interdicted from performing his contractual duties. The respondent was employed between 1970 and 1975 and the arrears for each of those years were profits and gains in respect of his employment during that year.

By section 45 of the Income Tax Ordinance:-

> "(1) ... where it appears to the Board that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of income or within six years after the expiration thereof, assess such person at such amount or additional amount as according to its judgment ought to have been charged, and the provisions of this Ordinance as to notice of assessment, appeal, and other proceedings under this Ordinance shall apply to such assessment or additional assessment and to the tax charged thereunder."

Section 45(2) extends the six year time limit in cases of fraud or gross or wilful neglect but this provision has no application to the present case. This section 45 closely resembles rule 5 of the English Schedule E which was referred to in *Dracup v. Radcliffe (supra)*.

The Tax Appeal Board and the Court of Appeal found in favour of the respondent for different and differing reasons which do not affect the principle which their Lordships consider to be applicable to the present case. Their Lordships accordingly dismiss this appeal.